IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

No. 77-1168

* * *

DR. E. RICHARD FRIEDMAN, et al.,
Appellants

v.

DR. N. JAY ROGERS, et al.,
Appellees

* * *

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

* * *

JURISDICTIONAL STATEMENT

* * *

JOHN L. HILL
Attorney General of Texas

DAVID KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Appellants in their Official Capacities

February, 1978

SUBJECT INDEX

INDEX OF AUTHORITIES

Cases **Page**

United States Constitution

Statutes

28 U.S.C.

Article 4552, Tex. Rev. Civ. Stat. Ann.

Rules

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

No. _____

* * *

DR. E. RICHARD FRIEDMAN, et al.,
Appellants

v.

DR. N. JAY ROGERS, et. al.,
Appellees

* * *

JURISDICTIONAL STATEMENT

* * *

This appeal is from a judgment of the United States Three-Judge District Court for the Eastern District of Texas, entered on October 27, 1977, declaring Sections 5.13(d) and 5.09(a) of the Texas Optometry Act, Art. 4552, Tex. Rev. Civ. Stat. Ann., to be unconstitutional in part and enjoining the enforcement of such statutes. The suit was brought on August 25, 1975, by one member of the Texas Optometry Board, Dr. N. Jay Rogers, against the remaining five members of the Board, Dr. E. Richard Friedman, Dr. John Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Salvador S. Mora, both in their individual and official capacities. W. J. Dickinson, both individually and as President of the

Texas Senior Citizens Association, Port Arthur, Texas Chapter, intervened as a Plaintiff in the District Court, and the Texas Optometric Association, Inc., intervened as a Defendant. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion is attached hereto in the Appendix. The Final Judgment of the Court below, entered on October 27, 1977, is not reported, and that judgment is reproduced in the Appendix.

JURISDICTION

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern District of Texas, to enjoin as unconstitutional the enforcement of Sections 2.02, 5.09(a), 5.13(d), and 5.15(e) of the Texas Optometry Act. A three-judge district court was convened to hear this cause as then required by 28 U.S.C. §§2281 and 2284. The final judgment of the court was entered on October 27, 1977. The judgment declared a portion of Sections 5.09(a) and 5.13(d) of the Act unconstitutional and enjoined Defendants from enforcing such provisions. Notice of appeal was filed in the court below on December 20, 1977. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). Jurisdiction is sustained by the following cases which required this case to be heard by a three-judge district court and recognize a direct appeal to this Court from

judgments thereof. *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977); *Ohio Bureau of Employment Services v. Hodorz*, 431 U.S. 471 (1977); *Chapman v. Meier*, 420 U.S. 1, 14 (1975).

STATUTE INVOLVED

As noted above, the Court below held that Section 5.13(d) of the Texas Optometry Act, Article 4552, Vol. 13, Tex. Rev. Civ. Stat. Ann., 449, 481, was unconstitutional and restrained its enforcement. The statute reads, in pertinent part, as follows:

> Section 5.13(d). No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . .

QUESTIONS PRESENTED

I. Whether the lower court erred in holding Article 4552-5.13(d) unconstitutional under the First Amendment as an unwarranted restriction on the free flow of commercial information.

II. Whether the injunction issued by the Court below should be vacated under Rule 65(d), Federal Rules of Civil Procedure, because it is overbroad, it does not specifically state what action is enjoined, and it encompasses issues not raised or litigated in the court below.

III. Whether certain Orders Pendente Lite entered by the court below exempting individual optometrists from certain provisions of the Texas Optometry Act should be vacated because such orders are

overbroad, do not specifically state what provisions the Board is prohibited from enforcing, and encompass issues not raised or litigated.

STATEMENT

As noted above, the lower court ruled that Sections 5.09(a) and 5.13(d) of Article 4552 were unconstitutional in part. Since Appellants perceive no meaningful distinction between the prohibition of price advertising contained in Section 5.09(a) and that involved in *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977), the State has elected not to burden this Court with a fruitless appeal of this issue. However, on the basis of the State's long experience with regulation of the practice of optometry, Appellants believe that Section 5.13(d), which prohibits the practice of optometry under a trade name, is essential to the protection of the public health, and appeal the decision of the court below holding Section 5.13(d) unconstitutional. Appellants additionally appeal from the Final Judgment below since the injunction issued does not comply with the requirements of Rule 65(d), Federal Rules of Civil Procedure. For this same reason the Orders Pendente Lite entered by the court below should be vacated.

The prohibition of the practice of optometry under a trade name was originally adopted by the Optometry Board on December 21, 1959, as a part of the Professional Responsibility Rule. This action was taken subsequent to the overwhelming vote of optometrists licensed in Texas. Appellee Board member herein, together with his brother and another trade name owner, filed suit challenging the Rule. The Rule was upheld on the basis that the use of a trade name by optometrists had been abused to the detriment of the public. *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (Tex. 1967), *cert. denied*, 389 U.S. 52 (1967) [hereinafter *Carp*].

Prior to the 1969 legislative session, Appellee herein participated in a committee of legislators and optometrists which drafted the present Article 4552. All members of the committee agreed upon the compromise, including Section 5.13(d). Appellee now challenges the statute he helped create and has persuaded the lower court that Section 5.13(d) is unconstitutional. This ruling is erroneous. The State's proven interest is clearly sufficient to justify the incidental, indeed negligible, restriction upon the flow of commercial information which results from the trade name prohibition.

ARGUMENT AND AUTHORITIES

I. THE LOWER COURT ERRED IN RULING THAT THE PROHIBITION OF PRACTICE UNDER A TRADE NAME IS VIOLATIVE OF THE FIRST AMENDMENT

A. GENERALLY

Section 5.13(d) provides:

> No optometrist shall practice . . . optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . .

The lower court offered two justifications for its holding that this prohibition violated the First Amendment. First, a trade name is encompassed within the meaning of advertising since trade names call public attention to the product: "people identify the name with a certain quality of service and goods." (App. at 10). Second, the use of a trade name is protected "as part of the consuming public's right to valuable information . . . as to certain standards and quality and

availability of particular routine services." (App. at 10). In reliance upon *Bates v. State Bar of Arizona, supra,* and *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976) [hereinafter *Bates* and *Virginia*], the lower court held Section 5.13(d) violative of the First Amendment. In so doing, the court failed to analyze sufficiently both the facts of the case at bar and the applicable authorities. Section 5.13(d) is constitutional as a regulation of conduct which is based upon legitimate and important state interests. Any restriction upon First Amendment rights is incidental and does not significantly restrict the flow of information. Furthermore, Section 5.13(d) should be upheld as a reasonable restriction upon the manner of expression.

There is no doubt that Section 5.13(d) is not violative of the equal protection clause or the due process clause of the Fourteenth Amendment. The State has clearly satisfied the requirements of the Constitution that its regulation of the optometric profession be rationally related to the public welfare. *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Carp, supra; South Carolina Board of Examiners in Optometry v. Cohen,* 180 S.E.2d 650 (S.C. 1971); *See City of New Orleans v. Duke,* 427 U.S. 297 (1976); *Matthews v. Lucas,* 427 U.S. 495 (1976). The issue thus becomes whether an otherwise valid restriction upon the conduct of a licensee may be held violative of the First Amendment.

The court below purportedly relied on *Bates* and *Virginia* but ignored both the language of those decisions and other applicable rulings of this Court. In *Bates* and *Virginia* this Court was dealing with statutes which were directed at expression alone: the asserted protection of the public welfare was "protection based in large part on public ignorance." *Virginia, supra* at 769. Since "[t]he advertising ban [did] not directly affect

professional standards one way or another," the states involved were clearly suppressing information based on its content. *Virginia, supra* at 769. *See also Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). Neither *Bates* nor *Virginia* involved a statute such as Section 5.13(d) which regulates conduct and which affects freedom of expression only incidentally as a restriction upon manner, not content.

B. THE LOWER COURT ERRED BY APPLYING THE FIRST AMENDMENT BALANCING TEST

Section 5.13(d) prohibits the *practice* of optometry under a trade name. Any restriction upon the advertising of a trade name is incidental to a prohibition of conduct. In *Pittsburg Press Co. v. Pittsburg Commission on Human Relations,* 413 U.S. 376, 389 (1973), this Court stated that a First Amendment interest is

> altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

See Bates, supra 97 S.Ct. at 2709; *California v. LaRue,* 409 U.S. 109 (1973). Similarly, the First Amendment

> does not remove a business engaged in the communication of information from general laws regulating business practices.

Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 197 (7th Cir. 1977); *See also Curtis Publishing Co. v. Butts,* 388 U.S. 130, 150 (1967) (opinion of Harlan, J.); *Beneficial Corporation v. Federal Trade Commission,* 542 F.2d 611 (3rd Cir. 1976), *cert. denied,* 430 U.S. 983 (1977). However, Appellee Board member

herein, after years of effort to avoid a regulation of business conduct held valid by the Supreme Court of Texas, now asserts that, since the conduct expresses "commercial information," the state cannot prohibit it. By this reasoning a State could not prohibit chain-store legal and medical practices; its power would be limited to the difficult, if not impossible, task of insuring that individual attorneys and doctors render adequate legal and medical services in an assembly line environment.

The lengths to which the lower court's holding could go is demonstrated by a current suit against Appellants which challenges Section 5.15 of Article 4552 on First Amendment grounds. That section provides for separation of optometrists and opticians in order to avoid, among other evils, relationships which in the past have caused optometrists to accept lower quality lab work out of economic interest. While a First Amendment challenge of this regulation of conduct, which involves no restriction on the flow of information, is ludicrous, Appellants are being forced to defend such challenges arising out of the District Court's ruling below. Similarly, restrictions upon the number of hours a licensee must practice at each of his offices could be challenged since they prevent "chain-store" practices, the advertising of which would constitute "commercial information." *See Naismuth Dental Corp. v. Board of Dental Examiners*, 137 Cal. Rptr. 133 (Ct. App. Cal. 1977).

In *Pittsburg Press Co., supra*, this Court held that a state need not permit advertising of illegal commercial activity; the ruling of the court below is that a state may not make a commercial activity illegal because it cannot then be advertised. This holding is an unwarranted and unwise extension of the rulings in *Bates* and *Virginia* and significantly intrudes upon the power of a state to regulate its health care professions in the public

welfare. A state should not be required to support its regulations of professional conduct under the properly restrictive limitations of the First Amendment when the regulation at issue concerns conduct and does not restrict content of expression. In this context the First Amendment interest is "altogether absent." *Pittsburg Press Co., supra* at 389. This Court should reverse the lower court's ruling on this basis and make clear that *Bates* and *Virginia* do not disturb the state's power to regulate business, including the conduct of its licensed professionals, a power which has been protected by this Court for at least forty years. *See North Dakota State Board of Pharmacy v. Synder's Drug Store, Inc.*, 414 U.S. 156 (1973); *Williamson v. Lee Optical Co., supra; West Coast Hotel Co., v. Parrish*, 300 U.S. 379 (1937).

C. THE LOWER COURT ERRED IN ITS APPLICATION OF THE BALANCING TEST

In our view the lack of a cognizable First Amendment interest mandates reversal of the lower court's ruling. However, even applying those cases which concern a mixture of conduct and expression, the balance weighs in favor of the State.

The applicable standard upon which to review a regulation of conduct which incidentally affects freedom of expression is stated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

> . . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See also Buckley v. Valeo, 424 U.S. 1 (1976); *Younger v. Harris*, 401 U.S. 38, 51 (1971); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976).

The restriction upon "alleged First Amendment freedoms" in the instant case is certainly incidental. The communication which the lower court viewed as protected was information concerning a "certain quality of service and goods" and information "as to certain standards and quality, and availability of particular routine services." (App. at 10). The reference to goods is inapposite to this case. Opticians market goods and are permitted to practice under a trade name and advertise prices. Information concerning "quality of service" is of little value to the public; the quality of service varies with the skill and judgment of each optometrist. In *Bates* this Court noted that "advertising claims as to the quality of services . . . may be so likely to be misleading as to warrant restriction." *Id.* 97 S.Ct. at 2709. *See Bates, supra* 97 S.Ct. at 2710 (opinion of Burger, J.), 2713 (opinion of Powell, J.). These references were to information concerning the quality of an individual practitioner. To the extent that non-deceptive advertising of "quality of services" of optometrists is possible,it is not prohibited by the State. The only restriction in this regard is that, since practice under a trade name is prohibited, a trade name may not

be used to advertise the quality of service of possibly hundreds of optometrist. Even if non-deceptive advertising of "quality of services" by an individual is possible, clearly such an advertisement proclaiming in one breath the quality of hundreds of individuals would be deceptive *per se*; in this context it would inevitably constitute "puffing." Thus the lower court's holding that this "quality of service" information is protected by the First Amendment goes farther than this Court was expressly *unwilling* to go in *Bates*. Since this case is on the appellate docket the lower court's holding must be reversed in order to prevent its use as precedent. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Information concerning the "availability of particular routine services" is admittedly of some value to consumers; however, the lower court referred to no evidence which indicates that the public is presently deprived of such information. In fact, even before the lower court held the price advertising restriction of Section 5.09(a) unconstitutional, an optometrist was allowed to advertise his services. Without the prohibition of Section 5.09(a), a consumer now has access to direct information concerning the availability and the price of "particular routine services;" the communication of such information by any means other than a trade name is not prohibited.

The availability of this information illustrates the negligible impact of Section 5.13(d) on the free flow of commercial information. The prohibition does not restrict content of communication; it does not prevent an optometrist from directly advertising his services or even the quality thereof. What it does is prevent the use of a trade name, which Appellees will argue is the most effective means of communication. Leaving aside doubts concerning the

inherent inaccuracy of a trade name advertisement for the services of hundreds of practitioners, a "government is [not] compelled to permit the most *effective* means of expression chosen by the citizen." *Vietnam Veterans Against the War, Etc. v. Morton*, 506 F.2d 53, 58 n.14 (D.C. Cir. 1974). Section 5.13(d) "leaves open to the disputants other traditional modes of communication." *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722, 728 (1942).

In response to the negligible restriction upon expression involved in Section 5.13(d), the State presented compelling evidence of the importance of its interests in prohibiting practice under a trade name. As discussed in the above Statement, this is not a new problem to the State. In *Carp* the Texas Supreme Court upheld the trade name prohibition in its earlier form as a board rule. The court cited abundant authority for its holding, *id.* at 312, and reviewed the then current state of affairs as follows:

> [T]he trade or assumed name practice, like fee-splitting, disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist. . . . Dr. Carp operates seventy-one offices in Texas. He advertises them under the following [ten] trade names . . . . From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same. He has purchased and practices under their name although they are no longer associated with the respective offices in any manner. Illustrative of Dr. Carp's trade or assumed name practice is the situation that

> exists in Wichita Falls. Within a two-block area in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The same supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each independently owned and operated. Similar situations exist in Dallas and El Paso. . . .
>
> The practice of optometry under a trade name is a holding out to the public that the trade name is licensed. The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name. Prescriptions belong to those operating the trade name business rather than the prescribing optometrist. *The practice is confusing and misleading to the public.*
>
> [Emphasis added.]
>
> . . .
>
> Texas State Optical's advertising leaves the impression that one of the Doctors Rogers is present at a particular office. Actually they have neither been inside nor seen some of their eighty-two offices distributed generally over Texas. They list their names in phone books in cities where they do not purport to practice optometry and on plaques showing the names of the optometrists who serve particular offices

> though they do not in fact practice at such offices. . . . [S]uch practices are deceptive and misleading. . . .

Id. at 311-13. Furthermore, in the instant case the State presented evidence from several witnesses, including a former partner of Dr. Carp, that patient care suffers in a trade name practice. The State demonstrated by abundant testimony and documentary evidence that the control over individual optometrists by the owner of the trade name, the volume of patients each doctor must treat when the trade name owner refuses to employ more personnel, the destruction of the doctor-patient relationship, and the pressures to accept inferior lab work from optical companies connected with the owner of a trade name, virtually insure low quality health care in a trade name practice.[1]

In the face of these justifications, the lower court enjoined the State from prohibiting Appellee Board member, one of the original perpetrators of the state of affairs discussed in *Carp*, from practicing under a trade name. Just as he did in the 1950's, Appellee proposes to use the trade name utilized by his opticianries and will presumably require "licensees" to use those opticianries. Must the State allow the public's health care to be so jeopardized because of an incidental restriction upon the flow of "commercial information?"

That some but not all of the justifications presented by the State constitute secondary effects from the use of a trade name does not invalidate the State's regulation. Certainly the State may implement a "prophylactic

---

[1]These may be the reasons why twenty states restrict or prohibit the practice of optometry under a trade name.

solution instead of one that would have required its own personnel" to attempt the hopeless task of insuring that doctors of optometry do not submit to the inherent pressures of a trade name practice to the detriment of their patients. *California v. LaRue, supra* at 116; *Bates, supra* 97 S.Ct. at 2711 (opinion of Burger, J.), 2715 (opinion of Powell, J.). A State must have at least as strong an interest in the health care of its citizens than it does in preventing consenting adults from engaging in immoral conduct. *See California v. LaRue, supra.* In any event, the primary evils of trade names coupled with the resultant state policy in favor of practice under the licensed name are sufficient to justify the minimal restriction upon expression.

This case, unlike *Bates* or *Virginia*, involves a regulation directly aimed at maintaining high professional standards of *practice*. This Court has long deferred to states in the regulation of practice of its professions for

> forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), citing *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952). The lower court erred in overbalancing a negligible restriction upon the flow of "commercial information" against the interest of the state in maintaining high quality health care, in part because "a different degree of protection is necessary" in the commercial speech context. *Virginia, supra* at 771 n. 24; *Bates, supra* 97 S.Ct. at 2709; *See also Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

Similarly, section 5.13(d) may also be viewed as a valid restriction on the manner of expression. This Court has

> often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information. [citations omitted.]

Virginia, supra at 771; *Bates, supra* 97 S.Ct. at 2709; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Breard v. Alexandria*, 341 U.S. 622 (1951). The lower court impliedly recognized that a trade name in itself is meaningless by stating that the information communicated concerned quality and availability of services. The State has placed no other restrictions on communication of this information other than to prohibit deception. The justification for the prohibition here is totally independent from the content of the information allegedly communicated by a trade name; the interest served is among the most significant, protection of public health; and ample alternative channels are left open, including direct advertisement of the information itself. When one views the direct prohibitions upon communication which have been upheld by the federal courts, it would seem highly anomalous for state action which only restricts one manner of communication incident to the protection of public health to be held violative of the First Amendment. *See Pittsburg Press Co. v. Pittsburg Commission on Human Relations, supra; Carpenters Union v. Ritter's Cafe, supra; Savage v. Commodity Futures Trading Commission, supra; Beneficial Corp. v. Federal Trading Commission, supra; Mitchell v. King*, 537 F.2d 385 (10th Cir. 1976).

II. THE INJUNCTION AND ORDERS PENDENTE LITE ENTERED BY THE COURT SHOULD BE VACATED BECAUSE THEY ARE OVERBROAD

Paragraph 2 of the Final Judgment issued by the District Court enjoins Appellants from enforcing Section 5.13(d) of the Texas Optometry Act in the following language:

> Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, *or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.* [emphasis added].

(App. at 3). The only trade name provision raised by the pleadings and litigated by the parties was Section 5.13(d) of the Act. In its Memorandum Opinion, the court below addressed only Section 5.13(d). Under the requirements of Rule 65(d), Federal Rules of Civil Procedure, every order granting an injunction and every restraining order must set forth the reasons for its issuance, must be specific in terms, and must describe in reasonable detail, without reference to the complaint or other documents, the acts sought to be restrained. The injunction issued by the Court below is deficient in all these respects.

In *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 581 (1971), this Court stated that

an injunction decree must relate "specifically and exclusively to the pleadings and the proof." In the instant case, the Appellee's Petition challenged only Section 5.13(d) as prohibiting the practice of Optometry under a trade name and contained no reference to "other provisions" as included in the Final Judgment. Appellants were never apprised at any time during the trial of his cause that any "other provisions" were being challenged. Rather, the first indication that the enforcement of other provisions of the Act not raised in the pleadings was sought to be enjoined was contained in Appellees second proposed final judgment filed with the Court subsequent to the Court's issuance of the Memorandum Opinion.

It is fundamental that relief granted by the court in any proceeding must be within "the framework of the pleadings [and] the evidence." *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 222 (1944). *See Solesbee v. Balkcom*, 339 U.S. 9, 11 (1950). The court below deviated from the established policy of considering only those issues necessarily raised by the record. In one very ambiguous and vague sentence the District Court has, in effect, enjoined the Texas Optometry Board from enforcing valid provisions of the Act without specifying, in the Judgment or otherwise, what those provisions are. Appellees presented no evidence to show that any provisions of the Act, other than Section 5.13(d), in any way prohibit the practice of optometry under a trade name; Appellants were never given an opportunity to defend such unalleged contentions.

In *Schmidt v. Lessard*, 414 U.S. 473 (1974) [hereinafter *Schmidt*], plaintiff challenged the constitutionality of Wisconsin's involuntary commitment laws. The District Court held generally that the statutory scheme was unconstitutional and that the plaintiff and her class were entitled to injunctive relief. This Court held that

the order failed to satisfy the second and third clauses of Rule 65(d).

> [T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood ....Since an injunction order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.

414 U.S. at 476. The order in this case, just as in *Schmidt*, is not specific in terms and does not describe in reasonable detail what acts are enjoined. Consequently this Final Judgment should be vacated for the same reason the order in *Schmidt* was vacated.

Appellees herein submitted two proposed Final Judgments to the court below. The first proposed judgment did not contain the language of which Appellants now complain. Appellees withdrew their first proposed judgment and submitted a second proposed judgment, which included the overly broad language now a part of the Final Judgment. Appellants filed written objections to the language in question with the court below, and a conference was held by the Managing Judge. Appellees attempted to justify the inclusion of the broad language in the order on the basis of alleged verbal threats by Appellant Board members to the Appellee Board member to the effect that other sections of the statute could be enforced so as to deprive Appellee of the right to practice under a trade name. Appellants requested but were denied an opportunity to refute those unsworn allegations made by Appellees

both in their brief and in chambers. Only after a Memorandum Opinion had been issued by the Court did Appellees realize that they had not asked for in their pleadings nor received in the Opinion all the relief they desired, and only then did they attempt to include broad, nonspecific language in the injunction.

The seriousness of this problem is illustrated by the fact that, at a recent Texas Optometry Board meeting, a party to this suit threatened the Appellant Board members with a possible contempt proceeding if the Board attempted to enforce Sections 5.11 and 5.15 of the Act. Section 5.11 forbids certain types of window displays and signs in an optometric office. Section 5.15 requires the practice of optometry to be completely separate from the business of a dispensing optician. Both of these sections restrict activities other than the practice of optometry under a trade name. An optometrist could easily practice under a trade name without violating Sections 5.11 and 5.15. The justifications for those sections are different from those for 5.13(d). Appellee, however, has argued to the Board that in his opinion and in the opinion of his attorney, such sections in some way prohibit the practice of optometry under a trade name, and that he might be forced to seek an order of contempt against the Board members if they attempted to enforce said sections.

The Texas Optometry Board has been put in the position of having the duty under the laws of the State of Texas to enforce the provisions of the Act, but of not knowing which sections of the Act the Final Judgment enjoins them from enforcing. Furthermore, the threat of a contempt proceeding is being held over their heads. In *International Longshoremen's Association, Local 1291 v. Philadelphia, 389 U.S. 64, 76 (1967),* this Court

emphasized the importance of Rule 65(d):

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the Court intends and what it means to forbid.

The strict interpretation of Rule 65(d) is particularly applicable when the actions of a state administrative body are involved. In *Guam v. University Committee to End the War in Viet Nam,* 399 U.S. 383, 389, (1970), the Court said that compliance with Rule 65(d) "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign state." The District Court's order in this case threatens to paralyze enforcement of the statutory scheme for regulation of the practice of optometry. The Final Judgment is so vague that any unrelated provision could be construed by the court to fall under the heading of "other provisions." This situation renders the Board unable to effectively carry out its statutory duties. If this case is not reversed on the merits, the Final Judgment should be vacated, and the case remanded to the District Court with instructions to limit the scope of the injunction to the issues raised at trial and to set forth specifically which sections of the Act are declared unconstitutional.

During the course of the trial of this cause, the District Court issued a number of "Orders Pendente Lite," a representative copy of which has been attached in the Appendix. These orders exempted specified optometrists, none of whom were parties to this suit, from certain provisions of the Act. The court below had no authority to issue these exemptions to non-parties,

and the language in the orders was too broad for all the reasons previously stated with regard to the Final Judgment.

Some of the optometrists named in the orders Pendente Lite had sought leave to intervene. Although intervention was denied by the court below, the court granted the relief these optometrists had sought, thereby granting preliminary relief to persons not parties to the suit. These orders also violated Rule 65(d) because they were, in effect, injunctions issued against the Board to restrain them from enforcing provisions of the Act. Similar to the Final Judgment, the Orders Pendente Lite exempted the named optometrists from the provisions of §5.13(d) and "like trade name prohibitions." These Orders suffer the same basic defect as the Final Judgment. The Optometry Board does not know which provisions of the Act it can enforce against these persons. Accordingly, the "Orders Pendente Lite" should be vacated.

CONCLUSION

The ruling of the lower court constitutes an erroneous extension of this Court's holdings in *Bates* and *Virginia*. By applying the First Amendment to regulations of conduct rather than expression, the court below has intruded upon the State's well recognized authority to protect its citizens through rational regulation of its health care professions. It is difficult to perceive the limits of a ruling which finds "commercial information" in a mode of business organization, the use of which has been prohibited by a State. This case should be reversed upon the lack of any significant First Amendment interest. Furthermore, the reliance of the lower court upon First Amendment protection of "quality of services" information ignores this Court's statements in *Bates* and requires reversal of the result reached by

the lower court in its application of the balancing test. Finally, portions of the Final Judgment and Orders Pendente Lite should be vacated.

WHEREFORE, PREMISES CONSIDERED, Appellants pray that this Honorable Court note probable jurisdiction of this case and reverse the decision of the Court below with respect to Section 5.13(d) of the Act, or, in the first alternative, that this case be set for argument and plenary consideration, or, in the second alternative, that the Final Judgment and Orders Pendente Lite be vacated and the case remanded to the District Court.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Texas 78711
(512) 475-3131

Attorneys for Appellants in their Official Capacity

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

CERTIFICATE OF SERVICE

I, David M. Kendall, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above referenced cause on behalf of the Appellants in their official capacity. I do hereby certify that three copies of the foregoing Jurisdictional Statement have been served on all parties required to be served by placing same in the United States Mail, First Class, Certified and Postage Prepaid on this _____day of February, 1978, addressed to each of the following: Mr. Robert Q. Keith, 1400 San Jacinto Building, Beaumont, Texas 77701; Mr. Larry Niemann, 1210 America Bank Tower, Austin, Texas 78701; Mr. Brian R. Davis, 408 First Federal Plaza, 200 East 10th Street, Austin, Texas 78711; Mr. John Tucker, Beaumont Savings Bldg., Beaumont, Texas 77701.

DAVID M. KENDALL

APPENDIX
TO
JURISDICTIONAL STATEMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
P. O. Box 231
Beaumont, Texas 77704
October 28, 1977

TO ALL COUNSEL
OF RECORD

Re: Civil Action No.
B-75-277-CA
Dr. N. Jay Rogers,
ETAL vs. Friedman,
Dr. E. Richard, et al

This is to advise that the following instrument was filed in the above cause on October 27, 1977.

FINAL JUDGMENT - Found certain sections of the Optometry Act of Article 4552 revised Civil Statute Civil Statute of Texas unconstitutional and Sect. 2.02 of the act as constitutional. Overruled Motion to dismiss for improper venue; and Parties to Pay own expenses.

Certified copies mailed to all counsel of record.

MURRAY L. HARRIS, CLERK

By S/S
Deputy Clerk

cc: Hon. Irving L. Goldberg
Hon. Joe J. Fisher
Hon. Wm. Steger
Stephen L. Burkett
Robert Q. Keith
Brian R. Davis
James B. Wesley
Robert L. Oliver
Larry Niemann
John G. Tucker
Joe R. Greenhill, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Dr. N. Jay Rogers,
Plaintiff;

W. J. Dickinson,
Individually and as
President of the Texas
Senior Citizens
Association, Port Arthur,
Texas Chapter,
Intervenor;

VS. No. B-75-277-CA

Dr. E. Richard Friedman,
Dr.John B. Bowen,
Dr. Hugh A. Sticksel, Jr.,
Dr. John W. Davis, Dr. Sal
Mora,
Defendants;

Texas Optometric
Association, Inc.,
Intervenor.

FINAL JUDGMENT

In accordance with the memorandum opinion of the Court dated September 12, 1977, in the above styled and numbered cause, it is the Order, Judgment, and Declaration of the Court that:

1. Section 5.09(a) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it prohibits optometrists from making "any statement or advertisement of price of optometric services or materials." The members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same.

2. Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it prohibits optometrists from making "any statement or advertise-
optometry under, or use in connection with his practice optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.

A True Copy I certify
Murray L. Harris, Clerk
U.S. District Court
Eastern District, Texas
By: S/S

Civ. Order Book
Vol 82 Page 358

3. Section 5.15(e) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires a mandatory colloquy between the optometrist and his patient regarding referral to a dispensing optician; and such is not in violation of the First or Fourteenth Amendments of the First or Fourteenth Amendments of the United States Constitution.

4. Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires two-thirds of the Optometry Board members to be members of a state optometric association which is recognized by and affiliated with the American Optometric Association; and such provision is not in violation of the First and Fourteenth Amendments of the United States Constitution.

5. Defendants' Motion to Dismiss for Improper Venue, as contained in Defendants' Amended Answer, is hereby overruled.

6. All other relief not herein specifically granted is denied.

7. The Court's finding of fact and conclusions of the law set forth in the Court's memorandum opinion dated September 12, 1977, are hereby incorporated herein.

8. This judgment shall be considered for purposes of appeal and otherwise, as a final judgment in this case.

9. All parties shall pay costs as heretofore incurred and expended by them, respectively.

10. Judgment is not stayed pending the appeal hereof, with the caveat to all parties acting in reliance upon the

Court's findings of constitutionality and unconstitutionality that the Court's rulings are subject to final adjudication upon appeal.

SIGNED this *27th* day of October, 1977.

S/S Irving L. Goldberg
United States Circuit Judge

S/S Joe J. Fisher
United States District Judge

S/S William M. Steger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS

SEP 20, 1977

Murray L. Harris, Clerk
By
Deputy Elizabeth H. Smith

Dr. N. Jay Rogers,
Plaintiff;

W. J. Dickinson,
Individually and as
President of the Texas
Senior Citizens Association,
Port Arthur, Texas
Chapter,
Intervenor;

Vs. No. B-75-277-CA

Dr. E. Richard Friedman,
Dr. John B. Bowen, Dr.
Hugh A. Sticksel, Jr., Dr.
John W. Davis, Dr. Sal
Mora,
Defendants;

Texas Optometric
Association, Inc.
Intervenor.

MEMORANDUM OPINION

By this civil action, filed pursuant to, *inter alia*, U.S.C. §1983 and 28 U.S.C. §§ 1343, 2281, *et. seq.*, Plaintiffs seek to enjoin on constitutional grounds enforcement of provisions of the Texas Optometry Act, Tex. Rev. Civ. Stat. Ann. art. 4552-1.0l, *et. seq.*, by the Texas Optometry Board ("Board"). More specifically, Plaintiffs assert the following are violative of their constitutional rights under the first and fourteenth amendments: (1) the prohibition against price advertising, Vernon's Ann. Civ. Stat. art. 4552-5.09(a); (2) the mandatory colloquy between the optometrist and his patient regarding referral to an optician, Vernon's Ann. Civ. Stat. art. 4552-2.02; and (4) the forbiddance of practice under a trade name, Vernon's Ann. Civ. Stat. art. 4552-5.13(d).

Vernon's Ann. Civ. St. art. 4552-5.09(a) provides in pertinent part that "(n)o optometrist shall publish or display . . . any statement or advertisement of any price offered or charged by him for any opthalmic services or materials . . . ." The recent decision of the Supreme Court in *Bates v. State Bar of Arizon*, ___U.S.___, 97 S.Ct. 2691, 52 L.Ed. 2d ___ (U.S. June 27, 1977), makes it clear, however, that any blanket suppression of truthful price advertising is a violation of the right of commercial free speech. The Court therefore holds that art. 4552-5.09(a) is violative of the First Amendment.

The Texas Optometry Act further provides that "(n)o optometrist shall practice . . . optometry under, or use in connection with his practice of optometry, any . . . trade name . . . other than the name under which he is licensed

A True Copy I Certify
Murry L. Harris, Clerk
U. S. District, Texas
Eastern District, Texas
By: S/S

Civ. Order Book
Vol. 82 Page___

to practice optometry in Texas . . . ." Vernon's Ann. Civ. Stat. art. 4552-5.13(d). As noted above, Plaintiffs have asserted that this article infringes on their constitutional rights. More particularly, they allege that it transgresses on their right to commercial free speech under the first amendment. [1]In deciding a first amendment question, the Court's function is to balance competing interests. That is, it must weigh the purported justifications for the restriction in question against its deprivation of first amendment rights and the subsequent harm, if any. See generally *Konigberg v. State Bar*, 366 U.S. 36 (1961); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976).

In the instant case, Defendants assert that in the first amendment balancing test, any possible harm to the public is far outweighed by (1) the dangers to the doctor/patient relationship, (2) the deterioration of the quality of eye care, (3) the practical "concealment" of the optometrists' identity, and (4) the potential for deception and misrepresentation inherent in an assumed name practice. Based on the evidence and briefs before this Court, the Court finds Defendants' assertions unpersuasive. Although the Defendants rely extensively on supportive language contained in the

---

[1] Plaintiffs also assert infringement of their fourteenth amendment rights. This Court notes, however, that the Supreme Court has consistently upheld commercial regulations by states in the face of fourteenth amendment challenges where the state action was grounded in rational bases. See, *e.g. New Orleans v. Dukes*, 427 U. S. 297 (1976); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). Since the Court feels, however, that the first amendment challenge is dispositive of this question, it does not address the fourteenth amendment arguments of the parties.

decision of the Texas Supreme Court in *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (1967), this Court notes (1) the question before the Texas Court in *Carp* was not constitutional but whether the Texas board had exceeded its delegated power from the Legislature, (2) the names whose use were in question were those of licensed optometrists who sold Carp their locations, and (3) the *Carp* decision was rendered well before the recent Supreme Court pronouncements in *Va. Pharmacy Bd. v. Va. Consumer Council, supra*, and *Bates v. State Bar of Arizona, supra.*

In both the*Bates* and *Virginia Pharmacy* decision, in the process of striking down blanket suppression of truthful advertising, the Supreme Court addressed at great length the importance of commercial free speech in society. The Court declared in *Bates* that "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates v. State Bar of Arizona, supra* at 12. Further, that "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Ibid.* In *Virginia Pharmacy, supra* at 765, the Court stated

> So long as we preserve a predominately free enterprise economy, the allocation of our resources . . . will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

There are two closely related arguments in the instant case for the inclusion of trade names within the

protected first amendment right of commercial free speech. The Court finds both persuasive. The first is that a "trade name" is encompassed within the meaning of advertising and thereby comes under the auspices of the first amendment protection recently granted to advertising by professional people. Therefore, it is argued that any blanket suppression of such commercial speech is unconstitutional. See *Bates v. State Bar of Arizona, supra.*

The argument for inclusion of trade names within the protective fold of advertising, is generally as follows: trade names, a common law right developed by virtue of being in business, grow as a result of the fact that people identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product.

The second argument is that, even if a trade name is not an integral part of advertising per se, there is a first amendment right to the use of a trade name as part of the consuming public's right to valuable information. More specifically, that the Texas State Optical name (TSO) has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services.

As stated above, the Court finds both arguments persuasive. Accordingly, this Court, applying the rationale of the advertising cases[2] to the trade name question, holds that blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information and therefore represents an unconstitutional violation of the first

---

[2] See *Bates v. State Bar of Arizona,* ___U.S.___, (Slip Op. No. 76-316), (June 27, 1977); *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U. S. 748 (1976).

amendment.[3]

Vernon's Ann. Civ. Stat. art. 4552-5.15(e) requires an optometrist, if he determines a patient needs lenses, to inform the patient (1) that the optometrist will prepare or have the lenses prepared according to the prescription, or (2) that the patient may have the prescription filled by any dispensing optician, not naming any particular optician, but should return for an optometrical examination of the lenses. The article further provides that "(i)f the patient chooses the first alternative, the optometrist may refer the patient to a particular optician . . . ."

Plaintiffs allege that this denies the optometrist the right under the First Amendment to furnish information as to where the patient can have his prescription filled, and that the patient is denied the right to obtain information from his optometrist as to where he can get his lenses made unless he accepts the statutorily required offer by the optometrist. Plaintiffs argue that the optometrist should be allowed to make a referral to a particular optician without the patient first requesting it. In addition, Plaintiffs allege a denial of equal protection because both opthamologists and osteopaths freely refer their patients to particular dispensing opticians. The Court does not find this article violative of Plaintiffs' constitutional rights.

Initially, the Court notes that first and fourteenth amendment rights are not absolute. As the Supreme

---

[3] The Court would point out (1) that it rejects the contention that the TSO name misleads the public as to who is the responsible optometrist, *generally see Bates v. State Bar of Arizona, supra* at 29, and (2) the fact that blanket suppression of a trade name is unconstitutional does not prohibit or invalidate regulations having to do with the posting of the optometrist's names present, or the requirement that those optometrists whose names are posted work so many hours per week at their place of business.

Court observed in *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961),

> . . . general regulatory statutes not intended to control the content of speech but incidentally limited its unfettered exercise, have not been regarded as the type of law the First and Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, . . .

Evidence of a history of "kickbacks," economic tie-ins, and economic coercion peculiar to the optometric field provides a rational basis for a legitimate legislative purpose in enacting this article. See *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

Further, by its wording, the clear purpose of this article appears to be to prevent the patient from being led to believe that the lense prescription must be taken to a particular optician, but instead requires that he be told that the optometrist can prepare or have the lenses prepared, *OR* that the patient may have the prescription filled by any optician he chooses. Therefore, the rationale of the recent Supreme Court cases involving advertising and first amendment rights is not applicable, since the effect of the article in question is not to restrict, but to encourage the free flow of commercial information to consumers. *See Bates v. State Bar of Arizona, supra*, and *Virginia Pharmacy Board v. Virginia Consumer Council, supra.*

Plaintiffs' equal protection allegations are also unpersuasive. As one three judge court observed in *Wall v. American Optometric Association, Inc..*, 379 F.Supp. 175, 191 (1974), aff'd 419 U.S. 888 (1974), in rejecting an equal protection argument against distinguishing

between opthamologists and optometrists,

> The equal protection clause of the Fourteenth Amendment does not require the state to treat different groups in the same manner. Only unreasonable discriminations are forbidden. *Williamson v. Lee Optical*, 348 U.S. 483 (1955)

Finally, the Court turns its attention to Vernon's Ann. Civ. Stat. art. 4552-2.02, which provides in pertinent part that "[a]t all times there shall be a minimum of two thirds of the [Texas Optometry] board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association." Plaintiffs assert that the resulting "4-2" Board composition is a violation of their rights to equal protection and due process.[4] More specifically, Plaintiffs allege there is no rational basis for the differentiation between Texas Optometric Association [TOA] and non-TOA optometrist which would justify the distinction made between them for Board membership. Therefore, Plaintiffs assert non-TOA members, though equally qualified, are denied equal access to the governing Board, and are thereby deprived of an equal opportunity to exercise political influence. Plaintiffs also contend that the board composition requirements are unconstitutional because they create an irrebuttable presumption that TOA members are two-thirds more likely to be qualified than non-TOA members. In addition, Plaintiffs allege that the composition of the board deprives them of procedural

---

[4] The intervening senior citizens also contend that the Board composition leads to statutory interpretations restricting advertising and other methods of communicating commercial information, thereby resulting in an abridgment of their first amendment rights. Whatever merit the senior citizens' claim may have had, the Court feels the argument is mooted by the Court'sadherence, elsewhere in this decision, to *Bates v. State Bar of Arizona, supra.*

due process, since eventually non-TOA members could be brought or charged before a biased (in favor of TOA members) Board.

On the other hand, Defendants assert that the allegedly unique problems the optometry profession has had in the areas of quality of care, "kick-backs" and tie-ins, and economic control over many members of the profession, provide a rational basis for state regulation. More particularly, Defendants allege the following rational bases for the requisite board composition:

(1) TOA members are more likely to be economically independent than non-TOA members;

(2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and,

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

In addressing Plaintiffs' equal protection arguments, the Court must bear in mind the deference which the judiciary gives to the legislative branch in the area of economic regulations. As the Supreme Court observed in a recent decision, *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976),

> When local economic regulations is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discrimination. See *e.g.*, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory

> discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

The Supreme Court has previously held that "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . ., " *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940).

The Court rejects Plaintiffs' attempt to analogize the instant case with *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974), since (1) there the Court was dealing with an inherently suspect classification (racial imbalance was involved), and (2) the basis of Plaintiffs' argument is found in a possible implication contained in dicta in the Supreme Court opinion.

Nor does the Court feel, in the face of Defendants' asserted rational bases, that Plaintiffs have carried the heavy burden required of them to prevail on equal protection grounds against state regulation.

The Court is also unconvinced by Plaintiffs' substantive due process arguments. Plaintiffs' reliance on three Supreme Court cases, *Vlandis v. Kline*, 412 U.S. 441 (1973), *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those non-fundamental rights cases involving sovereign state

regulation of economic matters. See, *e.g., New Orleans v. Dukes, supra*; *Williamson v. Lee Optical of Oklahoma, Inc., supra*. A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

The Court also is unpersuaded by Plaintiffs' procedural due process arguments. As one Court has noted, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest . . . ." *Wall v. American Optometric Association, Inc., supra*. *Wall* and *Gibson v. Berryhill*, 411 U.S. 564 (1972) are both readily distinguishable from the instant case for several reasons: (1) those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which surround disciplinary adjudications; (2) in those cases the board had rule-making power, which they had exercised, while in the instant case the Texas Board has no rule-making power, but only power to enforce what the legislature had mandated; and (3) *all* members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

In deciding in the face of the instant challenge that Vernon's Ann. Civ. Stat. art. 4552-2.02 is not violative of the Constitution, the Court does not address the potential constitutional problems if, in the future, non-TOA members should be charged and brought for a hearing before the Board as presently composed. The Court feels compelled to point out, however, that it is clear "that those with substantial pecuniary interest in legal proceedings should not adjudicate [such] disputes." *Gibson v. Berryhill, supra*. Further, the Court points out that " '[m]ost of the law concerning disqualification because of interest applies with equal

force to . . . administrative adjudicators.' K. Davis, Administrative Law Text§1204, p. 250 (1972), and cases cited." *Id.* In addition, the Court would note that a constitutionally fatal bias in the statutory composition of a tribunal is not necessarily remedied by an offer of that tribunal to abdicate its statutory function. See *Wall v. American Optometric Association, Inc., supra*.

We have examined carefully all of Plaintiffs' other allegations and find each of them to be without merit.

Any finding of fact heretofore made which constitutes a conclusion of law is hereby adopted as a conclusion of law and any conclusion of law which is a finding of fact is hereby adopted as a finding of fact.

Counsel are directed to prepare an order in accordance with this Opinion.

SIGNED this *12th* day of September, 1977.

S/S Irving L. Goldberg
United States Circuit Judge

S/S Joe J. Fisher
United States District Judge

S/S William M. Steger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Dr. N. Jay Rogers,
Plaintiff;

W. J. Dickinson,
Individually and as
President of the Texas
Senior Citizens Association,
Port Arthur, Texas
Chapter,
Intervenor;

Vs. No. B-75-277-CA

Dr. E. Richard Friedman,
Dr. John B. Bowen, Dr.
Hugh A. Sticksel, Jr., Dr.
John W. Davis, Dr. Sal
Mora,
Defendants;

Texas Optometric
Association, Inc.,

Intervenor.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Salvador Mora, Defendants herein, appeal to the Supreme Court of the United States from that portion of the final judgment entered in this action on October 27, 1977 declaring Section 5.13(d) of the Texas Optometry Act unconstitutional and enjoining the above named defendants from enforcing said provision.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

S/S
DOROTHY PRENGLER
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3131

S/S

RICHARD ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Texas 78711
(512) 475-4651

Counsel for Defendants in their
Official Capacity

S/S

JOHN TUCKER
Counsel for Defendants
in their Individual Capacity

CERTIFICATE OF SERVICE

I, Dorothy Prengler, Assistant Attorney General of Texas hereby certify that a true and correct copy of the foregoing instrument has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to all counsel of record: Robert Q. Keith, 1400 San Jacinto Bldg., Beaumont, Texas 77701, Larry Niemann, 1210 American Bank Tower, Austin, Texas 78701 and Brian R. Davis, 408 First Federal Plaza, 200 E. 10th St., Austin, Texas on this the *19th* day of *December*, 1977.

S/S

DOROTHY PRENGLER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DIVISION OF
TEXAS

MAR 16 1977

MURRAY L. HARRIS, CLERK
DEPUTY S/S

Dr. N. Jay Rogers	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	B-75-277-CA
Dr E. Richard Friedman,	)	
Et Al	)	

ORDER PENDENTE LITE

Section 5.13(d) of the Texas Optometry Act, which prohibits an optometrist from practicing under a name other than the name under which he is licensed, is the subject of a direct constitutional attack in this case.

Intervenor's office at 61 Parkdale Plaza, Corpus Christi, Texas, becomes subject to the prohibition of Section 5.13(d) during the pendency of this suit. To avoid the substantial irrevocable expense and disruption attendant to converting such office so as to conform to the mandate of Section 5.13(d), it is accordingly

ORDERED that the office Texas State Optical at 61 Parkdale Plaza, Corpus Christi, Texas, is hereby declared exampt from the prohibitions of Section 5.13(d) and like "trade name" prohibitions of the Texas

Optometry Act until 60 days after final judgment is rendered by this Court herein, or pending further order of the Court.

DONE this *14th* day of *March*, 1977.

S/S
United States District Judge

A True Copy I Certify
Murray L. Harris, Clerk
U.S. District Court
Eastern District, Texas
By: S/S

Civ. Order Book
Vol. 79 Page 85